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In the Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether judges of the military Courts of Criminal Appeals (formerly known as the Courts of Military Review) are "inferior" rather than principal officers within the meaning of the Appointments Clause.

2. Whether the Secretary of Transportation has statutory authority to appoint judges to the Coast Guard Court of Criminal Appeals.

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OPINIONS BELOW

The orders of the United States Court of Appeals for the Armed Forces (Pet. App. 1a, 34a, 44a, 48a, 60a, 65a) are unreported. A prior opinion of the Court of Appeals for the Armed Forces regarding petitioner Edmond (Pet. App. 2a-11a) is reported at 41 M.J. 419. The opinion of the United States Coast Guard Court of Military Review (now called the United States Coast Guard Court of Criminal Appeals) regarding petitioner Edmond (Pet. App. 12a-33a) is reported at 37 M.J. 787. The opinions of the Coast Guard Court of Criminal Appeals regarding petitioners Lazenby, Leaver, and Leonard (Pet. App. 35a-43a, 45a-47a, 49a-59a) are reported at 42 M.J. 702, 42 M.J. 599, and 41 M.J. 900. The opinions of the Coast Guard Court of

Criminal Appeals regarding petitioners Nichols and Venable (Pet. App. 61a-64a, 66a-67a) are unreported.

JURISDICTION

The judgments of the United States Court of Appeals for the Armed Forces were entered on May 21 and June 27, 1996. The petition for a writ of certiorari was filed on August 16, 1996. The jurisdiction of this Court is invoked under 10 U.S.C. 867a and 28 U.S.C. 1259(3).

STATEMENT

1. The Appointments Clause states that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, Cl. 2. Thus, "[t]he Constitution for purposes of appointment * * * divides all its officers into two classes." *United States* v. *Germaine*, 99 U.S. 508, 509 (1879). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (per curiam).

2. The United States Coast Guard is "a military service and a branch of the armed forces of the United States at all times." 14 U.S.C. 1. "Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, and * * * shall be subject to the orders of the Secretary of the Navy." 14 U.S.C. 3. "[E]xcept when operating as a service in the Navy," however, "[t]he Coast Guard is a part of the Department of Transportation." 14 U.S.C. 1; 49 U.S.C. 108(a).

The Secretary of Transportation possesses general statutory authority to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a). The Secretary is also given broad authority to oversee the Coast Guard at all times when it is not operating as a service in the Navy. Thus, the Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation" and "reports directly to the Secretary." 49 U.S.C. 108(b). The Secretary of Transportation "may promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i).

3. This case concerns the method of appointment of judges on the Coast Guard Court of Criminal Appeals (formerly known as the Coast Guard Court of Military Review).[1] The Court of Criminal Appeals hears

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[1] Effective October 5, 1994, Section 924(b) of the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2831, redesignated the several Courts of Mili-

This Court subsequently concluded in *Weiss* that "those serving as military judges must be appointed pursuant to the Appointments Clause." 510 U.S. at 170. All of the trial and appellate judges whose appointments were at issue in *Weiss* were active-duty commissioned officers—a position that requires appointment by the President by and with the advice and consent of the Senate. See *ibid.* This Court recognized that Congress, in Articles 26 and 66 of the UCMJ, 10 U.S.C. 826, 866, did not require a second appointment to the position of military judge before the assumption of judicial duties. 510 U.S. at 170-171, 176. The Court also concluded that the Appointments Clause itself does not require a second appointment before military officers may discharge the duties of military judge. *Id.* at 172-176. The Court noted, however, that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question." *Id.* at 170 n.4 (citing Art. 66(a), UCMJ, 10 U.S.C. 866(a)).

One Term after its decision in *Weiss*, this Court issued its decision in *Ryder* v. *United States*, 115 S. Ct. 2031 (1995). The government conceded in *Ryder* that the Judge Advocate General's appointment of civilian members to the Coast Guard Court of Criminal Appeals did not comply with the Appointments Clause. See 94-431 U.S. Br. at 9 n.9. The government argued, however, that Ryder's conviction should be affirmed notwithstanding the defect in the civilian judges' appointments. See 115 S. Ct. at 2036-2037. This Court disagreed, holding that Ryder was "entitled to a hearing before a properly appointed panel of" the Coast Guard Court of Criminal Appeals.

Id. at 2038. The Court did not address the validity of the secretarial appointments of January 15, 1993.[4]

On remand, the Court of Appeals for the Armed Forces "concluded that it was necessary to determine whether the present Coast Guard Court of Criminal Appeals is properly constituted before remanding Ryder's case to that court for further proceedings." *United States* v. *Ryder*, 44 M.J. 9, 10 (1996). In resolving that question, the court first held that judges of the Court of Criminal Appeals were "inferior" officers within the meaning of the Appointments Clause. *Id.* at 10-11. "Applying a functional analysis to appellate military judges," the court observed, *inter alia*, that "the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction"; that military appellate judges "do not enjoy tenure"; and that those judges "may hold other positions as their primary duty and serve only part-time as appellate military judges." *Ibid.*

The court "turn[ed] next to the question whether Congress has given the Secretary of Transportation authority to appoint judges of the Court of Criminal Appeals." 44 M.J. at 11. The court concluded that the secretarial appointments were valid, explaining that "Congress has given the Secretary of Transportation broad authority in 49 U.S.C. § 323(a) to 'appoint . . . officers and employees of the Department of Transportation.' In our view, this includes civilian judges of the Coast Guard Court of Criminal Appeals." *Ibid.*

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[4] The decision of the Coast Guard Court of Military Review in *Ryder* was issued before the secretarial appointments of January 15, 1993. See 115 S. Ct. at 2034.

4. Each of the petitioners in this case was convicted by a court-martial. In each case the conviction and sentence was affirmed, in whole or in part, by the Coast Guard Court of Criminal Appeals (or its predecessor the Court of Military Review). Chief Judge Baum participated in each case. The decision in each case was issued after the January 15, 1993, secretarial appointments. Pet. 8. The Court of Appeals for the Armed Forces affirmed in each case, relying on its decision on remand in *Ryder*. Pet. 9; see Pet. App. 1a, 34a, 44a, 48a, 60a, 65a.

ARGUMENT

The Secretary of Transportation is a "Head[] of Department[]" within the meaning of the Appointments Clause, see 5 U.S.C. 101; 49 U.S.C. 102(a) and (b); *Freytag* v. *Commissioner*, 501 U.S. 868, 886 (1991), who may be vested by Congress with the power to appoint "inferior Officers." Petitioners contend that the Secretary's appointments of judges to the Coast Guard Court of Criminal Appeals are invalid because (1) those judges are principal officers who must be appointed by the President by and with the advice and consent of the Senate (Pet. 11-13), and (2) even if the judges are inferior officers whose appointment by the Secretary of Transportation would be constitutionally permissible, the Secretary lacked statutory authority to appoint them (Pet. 13-16). Those contentions are incorrect and do not warrant review by this Court.

1. Application of the functional approach described in *Morrison* v. *Olsen*, 487 U.S. 654, 671-673 (1988), indicates that judges of the Coast Guard Court of Criminal Appeals are inferior rather than principal officers. Like the independent counsel whose status

was at issue in *Morrison*, those judges are "subject to removal by a higher Executive Branch official." *Id.* at 671. See *Weiss*, 510 U.S. at 193 (Souter, J., concurring) (noting that "Court of [Criminal Appeals] judges have no fixed term of office"); *Ryder*, 44 M.J. at 11 (Court of Criminal Appeals judges "do not enjoy tenure and thus may be reassigned to other duties"). Those judges, moreover, are "empowered by the [UCMJ] to perform only certain, limited duties," *Morrison*, 487 U.S. at 671, and their "office is limited in jurisdiction," *id.* at 672. As the Court of Appeals for the Armed Forces observed, "the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction." *Ryder*, 44 M.J. at 10-11. Even with respect to those cases falling within its jurisdiction, the decision of the Court of Criminal Appeals is not dispositive, but is subject to further review by the Court of Appeals for the Armed Forces. See Art. 67(a), UCMJ, 10 U.S.C. 867(a).[5]

The Uniform Code of Military Justice does not require that judges of the Courts of Criminal Appeals be appointed by the President and confirmed by the Senate. See Art. 66, UCMJ, 10 U.S.C. 866. The statutory scheme thus reflects an implicit determination that those judges are not principal officers. That judgment should not lightly be disregarded. See *Weiss*, 510 U.S. at 194 (Souter, J., concurring) ("Since

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[5] By contrast with the Court of Criminal Appeals, judges of the Court of Appeals for the Armed Forces are appointed by the President, by and with the advice and consent of the Senate, for a fixed term of approximately 15 years. See Art. 142(b)(1) and (2), UCMJ, 10 U.S.C. 942(b)(1) and (2).

the chosen method for selecting military judges shows that neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political branches' judgment is appropriate, I conclude that military judges are inferior officers for purposes of the Appointments Clause.").

Finally, the question presented is not of sufficient importance to warrant this Court's review. The Coast Guard Court of Criminal Appeals decides only 20 to 30 cases per year. See Pet. 9. Although the UCMJ authorizes the use of civilian judges on the Courts of Criminal Appeals, see Art. 66(a), UCMJ, 10 U.S.C. 866(a), no branch of the Armed Forces other than the Coast Guard has chosen to utilize them. In light of the fact-specific nature of the inquiry, see *Morrison*, 487 U.S. at 671-673, the Court's resolution of this case would be unlikely to affect the status of large numbers of government officials; nor do petitioners contend that the lower courts are divided with respect to the general principles governing Appointments Clause analysis.

2. a. The appointments at issue here fall within the literal terms of the Secretary's statutory authority. The Secretary of Transportation is empowered to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a).[6] In addi-

[6] The Secretary has possessed that appointment authority since the creation of the Department of Transportation. See Pub. L. No. 89-670, § 9(a), 80 Stat. 944. Petitioners note that the Secretary is given specific statutory authorization to appoint particular officers within the Department of Transportation, see Pet. 14 (citing 49 U.S.C. 102(e), 104(b)(2) and (3), and 105(b)), and contend that "[n]one of these provisions would

tion to the general grant of authority over the Department as a whole, he is charged with oversight of the Coast Guard at all times when it is not operating as a service in the Navy. The Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation," and he "reports directly to the Secretary." 49 U.S.C. 108(b). The Secretary may "promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i). Those provisions give the Secretary of Transportation ample statutory authority to appoint judges to the Coast Guard Court of Criminal Appeals.

b. It is true that Article 66(a) of the UCMJ, 10 U.S.C. 866(a), provides that each service's Judge Advocate General "shall establish a Court of Criminal Appeals" and "shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him."[7] That provision does

be necessary if 49 U.S.C. § 323(a) were read literally." Pet. 14. Each of the provisions cited by petitioners, however, authorizes the Secretary of Transportation to appoint a particular officer "with the approval of the President," a qualification not included in the general grant of authority under Section 323(a).

[7] "Although Article 66 does not specifically state that the Judge Advocate General of the respective service will designate the members of the Military Courts of [Criminal Appeals], * * * [t]hat is how the statute has been interpreted since its passage." *United States* v. *Prive*, 35 M.J. 569, 571 (C.G.C.M.R. 1992). See also *Weiss*, 510 U.S. at 169 (judges of the Courts of

not, however, withdraw statutory authority to appoint such judges from any other official who possesses it. To construe Article 66(a) as divesting the Secretary of Transportation of that power would be particularly anomalous in light of the subordinate position of the Judge Advocate General within the Department. The Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. 801(1). The General Counsel is directed by statute to "carry out duties and powers prescribed by the Secretary," 49 U.S.C. 102(e), and could presumably be directed by the Secretary to appoint a particular individual to the Court of Criminal Appeals. To read Article 66(a) as divesting the Secretary of his power to appoint military judges within the Department would make sense only if that power were given to an official outside the Secretary's control. The Judge Advocate General is not such a person.

c. Recognition of the Secretary's appointment power furthers the purposes of the statutory scheme as a whole. Article 66(a) expressly provides that members of the Courts of Criminal Appeals "may be commissioned officers or civilians"; Congress thus sought to preserve the services' flexibility by ensuring that a wider pool of potential judges would possess the statutory qualifications. See note 2, *supra*. The Judge Advocate General, however, is not a "Head of Department." Though he may assign to military judgeships persons already commissioned as military officers, he lacks constitutional authority to

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Criminal Appeals "are selected and assigned to serve by the appropriate Judge Advocate General") (citing Art. 66, UCMJ, 10 U.S.C. 866).

appoint civilian judges to military courts. See page 6, *supra*. If Article 66(a) were construed as divesting the Secretary of Transportation of his statutory authority to appoint departmental officers and to administer the Coast Guard, and as conferring upon the Judge Advocate General exclusive authority to select members of the Coast Guard Court of Criminal Appeals, the use of civilian judges would be effectively precluded despite Congress's express approval of their use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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